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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 827

STANLEY FIELD,
Petitioner,

vs.

DE MET'S INCORPORATED,
Respondent.

REPLY OF PETITIONER, STANLEY FIELD, TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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PRELIMINARY STATEMENT.

In the petition and supporting brief it was shown that the decision sought to be reviewed involves the construction of a former Illinois statute in conflict with the applicable decisions of the Supreme Court of Illinois. The District Court adopted the construction urged by the petitioner and sustained motions to dismiss the complaint. The Circuit Court of Appeals, however, reversed and remanded the cause for trial.

The respondents contend, first, that certiorari is premature in such circumstances since the judgment is not final. They assert that the cause will be heard "piecemeal" if certiorari is granted at this time. (P. 5 of respondents'

brief in the *Aiken* case which is adopted on p. 3 of respondents' brief in the instant case.) This petition for certiorari, however, was filed for the very purpose of preventing any such piecemeal hearing and of avoiding the needless expenditure of time and money incident to a lengthy trial under an improper construction of the statute. Review of the judgment of the Circuit Court of Appeals will prevent "further protracting the litigation," which this Court stated was the reason for granting the writ of certiorari in *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 121 (1920), even though the judgments of the Circuit Court of Appeals involved there were not "final" but "called for further proceedings in the trial court." (See also *Chicago, B. & Q. Ry. Co.* v. *Willard*, 220 U. S. 413, where this Court granted certiorari to review the judgment of the Circuit Court of Appeals reversing a judgment of dismissal and ordering a remand to the District Court.)

In respect to the merits, the respondents fallaciously assume that Section 23 of the 1919 Illinois Corporation Act established liability for negligence. It did not. On the contrary, the statute established liability for active malfeasance. This basic fallacy underlies the respondents' contentions in respect to both of the essential requirements of statutory liability. (Section A as to knowledge on p. 12 of instant brief adopting I, D of *Aiken* brief and Section B as to ratification on p. 12 of instant brief adopting I, B of *Aiken* brief, which are answered on pp. 3 to 4 and 5 to 6, respectively, of this brief.) The Circuit Court of Appeals recognized that the Illinois statute did not provide liability for negligence, stating:

> "We think that the pleadings in this case, as in No. 7430, sufficiently charge the defendants with participation. Perhaps the evidence will not show this. Perhaps the evidence will show, as to one or more of the defendants, a want of control or command, an attitude of gross negligence, an irregular attendance plus perfunctory exercise of the voting power. see *Lewis* v.

Montgomery, 145 Ill. 30, 48, and *Slater* v. *Taylor,* 241 Ill. 102. Perhaps the evidence will not show this, but that is not important now." (R. 346)

The error of the Circuit Court of Appeals in the above quoted statement was in distinguishing between the evidence and the pleadings, not in failing to distinguish between negligence and malfeasance.

A.

THE ILLINOIS STATUTE REQUIRED KNOWLEDGE OF WRONGDOING AS A CONDITION PRECEDENT TO LIABILITY.

One of the principal requirements for liability under the Illinois statute is knowledge of wrongdoing. The respondents contend that "The statute says nothing about knowledge of the company's condition, so that the liability is imposed irrespective of knowledge or lack of knowledge." (P. 16 of respondents' brief in *Aiken* case which is adopted on p. 12 of respondents' brief in the instant case.) The decisions of the Supreme Court of Illinois which are referred to by the Circuit Court of Appeals in the portion of its opinion quoted above answer such a contention. Moreover, in *White-Wilson-Drew Co.* v. *Lyon-Ratcliff Co.,* 268 Fed. 525 (C. C. A. 7, 1920), it was held, in categorical terms, that a complaint under the Illinois statute which failed to allege that "the directors actually knew" the facts relating to the alleged impropriety should be dismissed since "such knowledge was a condition precedent to recovery." (pp. 526, 527) After stating the holding of the Supreme Court of Illinois in *Lewis* v. *Montgomery,* the Circuit Court of Appeals concluded that "We are of opinion that the words 'assenting thereto' mean a conscious approval of facts actually known." (p. 527)

The respondents contend that the 1872 Illinois statute involved in the *White* case made "assenting" to dividends a prerequisite to liability, whereas the 1919 statute here

involved imposed liability for "declaring or assenting" to dividends. (p. 12 of respondents' brief in instant case.) Significantly, however, neither the complaint nor the amendment thereto charged this petitioner, Stanley Field, with declaring dividends. The original complaint alleged that he, in common with the other directors, had "authorized or ratified" the payment of dividends. (R. 12) The amendment to the complaint alleged specifically in respect to each dividend complained of that Field "assented to the declaration of the dividend described" (in the preceding paragraph) "by voting in favor of a resolution ratifying, confirming, and approving said dividend." (R. 302-303, Pars. (f), (h), (j), (l), (n) and (p).)

Certainly the bookkeeping and accounting "irregularities", of which the respondents contend they alleged knowledge, are insufficient to impose liability under the Illinois statute. (P. 10 of respondents' brief in *Aiken* case which is adopted on p. 12 of respondents' brief in instant case, and R. 10.) The lack of "surplus" which the complaint here alleged as the sole basis for charging that the dividends were improper was expressly defined as the lack of any "actual surplus," if the company's books were changed to conform to the respondents' partisan views as to proper accounting and bookkeeping practices. (Par. 33 of Complaint (R. 12), incorporating par. 22 of Complaint (R. 10).) There is no charge that this petitioner, Stanley Field participated in the alleged bookkeeping and accounting improprieties. His relation to Corporation Securities Co. of Chicago was quite similar to that of the two directors who were freed from charges of liability under the Illinois statute in *Chick* v. *Fuller*, 114 Fed. 22 (C. C. A. 7, 1902). Field, just as were those two directors, should be exonerated as not being "purposely a party" to the transactions and practices which allegedly rendered the dividends improper. (p. 28)

B.

THE ILLINOIS STATUTE REQUIRED ASSENT IN ADVANCE OF DIVIDENDS AND RATIFICATION AFTER DIVIDENDS WAS INSUFFICIENT TO IMPOSE LIABILITY.

The respondents admit that this petitioner, Stanley Field, was not present at any of the meetings of the directors of Corporation Securities Co. of Chicago at which dividends were declared. (R. 302-303) Field is not charged with the declaration of dividends but with ratification of the dividends declared by other members of the board of directors, a so-called executive committee. Field was not one of the original directors who empowered the executive committee of the board of directors to declare dividends. The amendment to the complaint alleged that such power was given by a meeting of the board of directors held on October 8, 1929, and that Field was elected to the board of directors on June 11, 1930. (R. 305) The last paragraph of Section 23 of the 1919 Illinois Corporation Act provided that "Unless a director was absent from the meeting at which such dividend was declared or loan made, or unless his dissent therefrom shall be entered on the corporate records, he shall be conclusively presumed to have assented thereto." Although expressed in negative terms, this statutory provision effectively exempts from liability a director who was absent at the meeting at which dividends were declared. Consequently this petitioner is free from liability under the former Illinois statute.

While the respondents do not cite any Illinois decision in support of the contention, they state that courts "in other jurisdictions" have held "that ratification or approval of a dividend after it has been declared amounts to 'assent'." (P. 14 of respondents' brief in *Aiken* case which is adopted on p. 12 of respondents' brief in instant case.) The cases cited by respondents in support of this statement involve statutes which impose liability on directors for

negligence, under which ratification is sufficient. The earlier New York statute, for instance, which was involved in *Walker* v. *Man*, 253 N. Y. S. 458 (cited at p. 14 of *Aiken* brief), provided that the directors should be liable for any money or property "which they have acquired to themselves, or transferred to others, or lost, or wasted, by or through any neglect of or failure to perform or other violation of their duties." (Quoted in 253 N. Y. S. at p. 461.)[1] Section 23 of the 1919 Illinois Corporation Act contained no such provision, and Illinois has never had any such statute.

Similarly, the Kentucky, Wisconsin and Massachusetts cases cited by the respondents involve, respectively, statutory liability of bank directors for negligence, receipt by directors of improperly declared dividends, and personal participation in the payment of dividends. Such cases have no applicability here. The cause of action relating to dividends in this case arises solely under the former Illinois statute, Section 23 of the 1919 Illinois Corporation Act, and the liability of this petitioner is governed by that statute and not by the statutes in any other States.

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[1] The Court is referred to the recent decision of the Supreme Court of New York County in *Randall* v. *Bailey*, 23 N. Y. S. (2d) 173 (1940), which was unanimously affirmed by the Appellate Division, First Department, in a memorandum decision, 29 N. Y. S. 512 (1941), and which construed a New York statute more nearly similar to Section 23 of the 1919 Illinois Corporation Act. In sustaining motions for judgment in favor of defendant directors, charged with declaring dividends which impaired capital in violation of such New York statute, the court held that the statute required "a determination of the value of the assets at each dividend declaration" and stated: "My views of the business acumen or financial sagacity of these directors, as well as my views as to what the legislature ought to permit or prohibit, are entirely immaterial. The question I have to decide is whether or not an existing statute has been violated. The problem is one of statutory construction." (pp. 179, 182)

CONCLUSION.

This petitioner respectfully urges that the petition for a writ of certiorari filed by him be granted, and that, on hearing, this Court set aside the judgment of the Circuit Court of Appeals for the Seventh Circuit in so far as it reverses the order of the District Court and affirm the decree of the District Court in all respects.

Respectfully submitted,

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